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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NORTH AMERICAN PHILIPS CONSUMER ELECTRONICS CORP., a Tennessee corporation, and PARK TELEVISION d/b/a PARK MAGNAVOX HOME ENTERTAINMENT CENTER, an Illinois partnership,

Petitioners,

v.

ATARI, INC., a Delaware corporation and MIDWAY MFG. CO., an Illinois corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Where the concept, idea and method of operation of a video game are undisputedly beyond the scope of copyright protection, can the copyrightable material in an "audiovisual work" which results from the play of such a video game provide a monopoly over a basic geometrical form of the central playing character (in this case, a circle) and monopolize that geometrical form as well as other geometrical forms (such as a diamond) and variations thereof?

2. What are the steps constituting an appropriate test to logically evaluate a claim that a game or other product which produces an audiovisual work infringes a copyright on the protectable portion of the expression of an idea embodied in an audiovisual work, recognizing that the idea is unprotectable?

These questions arise in the context of an action for copyright infringement between manufacturers of video games.

LISTING PURSUANT TO RULE 28.1

The intermediate parent corporation and parent corporation of petitioner NORTH AMERICAN PHILIPS CONSUMER ELECTRONICS CORP. are North American Philips Development Corporation and North American Philips Corporation, respectively.

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Petitioners NORTH AMERICAN PHILIPS CONSUMER ELECTRONICS CORP. ("North American") and PARK TELEVISION d/b/a PARK MAGNAVOX HOME ENTERTAINMENT CENTER ("Park") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on March 2, 1982.

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit, which reversed a decision of the United States District Court for the Northern District of Illinois, Eastern Division, were rendered on March 2, 1982. The opinion is reported at 672 F. 2d 607. A copy of the opinion is annexed as Appendix A, and a copy of the judgment is annexed as Appendix B. The opinion of the District Court was rendered on December 4, 1981 and is only unofficially reported at CCH 1982 Copyright Law Decisions, ¶ 25,363. A copy is annexed as Appendix D.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on March 2, 1982. No petition for a rehearing was filed. The jurisdiction of this Court to review the judgment and opinion of the Court of Appeals is invoked pursuant to 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 17 U. S. C. §§ 101, 102 and 501. The relevant parts of these statutory sections are set forth in Appendix F.

STATEMENT OF THE CASE

This is an action for copyright infringement; the federal courts have jurisdiction of this case pursuant to 28 U. S. C. § 1338(a).

A resolution of the issues stated in the Questions Presented above is of pressing national importance because of the vast

number of pending copyright actions and evident escalation of copyright actions in which such a resolution is critical. The serious economic consequence of the decision on these issues in the court below to competitive companies in the burgeoning video game industry is also evident.[1] Further, an identification of the specific steps a court should take in order to find whether "substantial similarity" is present in resolving the issue of copyright infringement is important to the copyright system at large. The different tests applied in the different circuits are currently causing great confusion as exemplified by the Seventh Circuit's Opinion in the present case.

Plaintiffs-respondents, Atari, Inc. ("Atari") and Midway Mfg. Co. ("Midway"), alleged owners of rights under a copyright in the audiovisual display of the video game PAC-MAN, moved for a preliminary injunction to enjoin defendants-petitioners, North American Philips Consumer Electronics Corp. ("North American") and Park Television d/b/a Park Magnavox Home Entertainment Center ("Park"), from advertising, distributing, and selling a home video game cartridge to play the game K. C. MUNCHKIN. The Certificate of Copyright Registration on the PAC-MAN display was issued on November 13, 1980. Several witnesses testified during the hearing on plaintiffs' motion, including the designer of the K. C. MUNCHKIN game, and also an expert in the video game field. The District Court received numerous documentary and physical exhibits, including exemplary forms of the PAC-MAN and K. C. MUNCHKIN video games.

Thereafter, the District Court denied Atari's and Midway's motion, holding that they had not shown a probability that the copyright in the PAC-MAN audiovisual display was infringed. That Court held, specifically:

> "[P]laintiffs must prove that defendants performed and distributed games copied from the audio-visual work, 'Pac-Man.' * * * [P]laintiffs, on a trial of the merits, will not be able to make this proof." (App. D12)

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[1] *See* pp. 24-26, *infra*.

• • • •

"[E]vidence in this record shows that K. C. Munchkin is not substantially similar to Pac-Man." (App. D13)

On March 2, 1982, the Court of Appeals for the Seventh Circuit reversed the District Court in the Opinion and Judgment which petitioners here seek to have reviewed.

The evidence showed that Midway manufactures and sells coin-operated television games, including PAC-MAN, intended for use in arcades, bars, and similar public places. Atari and North American manufacture consoles for connection by consumers to their home television receivers to enable the playing of games under the names "Video Computer System" and "Odyssey²", respectively, as well as cartridges for insertion into their own consoles to permit the playing of different games. The cartridges of one may not be used with the consoles of the other. Atari has a license under the copyright in the PAC-MAN audiovisual work for the home field, but as of the date of the hearing on the motion for a preliminary injunction had not yet commenced shipment of its PAC-MAN cartridge. Such shipments did commence by March of this year. Park is a retailer of North American products.

The District Court in its opinion rendered December 4, 1981 (App. D) described the PAC-MAN game as viewed during the evidentiary hearing on the motion for a preliminary injunction.[2] Through a viewing plate, a player sees a television type display showing a single oblong-shaped maze filled with dots through which several characters move. The District Court described the central character as:

"... a yellow dot with a V-shaped aperture at one side which opens and closes like a mouth. The maze appears in double blue lines; and throughout are several hundred evenly spaced pink dots which the central, yellow character gobbles as he moves about." (App. D4)

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[2] Visual displays produced by the two games at issue are shown in the photographs at App. Q1-Q3.

He also described the other figures and the audio background:

> "There are four other moving figures or characters, identical except that one is red, one blue, one turquoise, and one orange. All of these, sometimes called goblins, have eyes and appendages which similate feet . . . When the goblins are in their original variety of colors the central character is vulnerable, so that when the central character and one of the goblins collide, the central character is deflated (with accompanying audible sounds) . . . [T]hroughout the play of Pac-Man a number of musical notes are sounded for the audio portion of the game, and also a number of whistles and siren-like sounds can be heard in the background." (App. D4)

The District Court described K. C. MUNCHKIN as having "a different visual display" (App. D5). The Court found that in K. C. MUNCHKIN there is a practically infinite number of different mazes, "all of which give patterns as a matter of mechanics, as a matter of appearance, and as a matter of play and tactics and technique. There is a variety of mazes in K. C. Munchkin." The District Court described the characters in K. C. MUNCHKIN as "different from those in 'Pac-Man'," and continued:

> "In K.C. Munchkin the central character, the munchkin, appears as a blue figure with horns, normally with a smile, but when he is attacked by a monster, his smile turns to a frown; and then he evaporates upwardly from the screen. The character, or the appearance of the central figure, is that he initially faces the viewer rather than showing a profile. As he moves along the maze he shows a profile, and when he stops, he turns around to face the viewer with another smile. Thus the central character is made to have a personality which the central character in Pac-Man does not have. K.C. Munchkin has munchers which are much spookier than the goblins in Pac-Man. Their legs are longer and move more dramatically; their eyes are vacant, all of these features being absent in Pac-Man. The munchers are red, green and yellow." (App. D5)

With respect to the sounds in the K. C. MUNCHKIN game, the District Court found:

> "Finally, K.C. Munchkin has a set of sounds accompanying it which are distinctive to the whole line of Odyssey home video games. These sounds are not at all like the sounds which are played in the arcade form of Pac-Man. The tone sequences are different, the notes are different, and create an entirely different impression on the listener." (App. D7)

The District Court, after this thorough study, held that Atari and Midway could not prove the fundamental element of their case, copying. Moreover, the Court also applied the test of substantial similarity, *i.e.*, the "ordinary observer" test, saying:

> "However, substantial similarity for copyright infringement purposes is determined by the ordinary observer test. *Novelty Textile Mills, Inc.* v. *Joan Fabrics Corp.*, 558 F.2d 1090, 1093 (2d Cir. 1977); *cf.*, *Walter* v. *University Books, Inc.*, 602 F.2d 859 (9th Cir. 1979). But evidence in this record shows that 'K.C. Munchkin' is not substantially similar to 'Pac-Man.'" (App. D13)

The Court of Appeals reversed, stating that the District Court's conclusion on infringement was clearly erroneous. In its Order, it also remanded the matter to the District Court for the purpose of enjoining sales of the K. C. MUNCHKIN game during the pendency of the appeal proceedings. The Court of Appeals stated in that Order:

> "This Order is without prejudice to the setting of a bond by the District Court staying the enforcement of the injunction pending completion of the proceedings in this Court or before the Supreme Court of the United States." (App. C2)

What the Court of Appeals focused upon in finding a likelihood of copyright infringement was the *idea* that the central character in PAC-MAN is expressed as a "gobbler" and the *idea* that four pursuit characters are expressed as "ghost monsters" (App. A4). Pursuing this course, the Court of

Appeals found that K. C. MUNCHKIN "employs a player-controlled central character (also expressed as a 'gobbler') and pursuit characters (also expressed as 'ghost monsters')" (App. A4). Then, in describing the appearance of these characters, the Court of Appeals simply brushed aside the District Court's findings that "the central character [in K.C. MUNCHKIN] is made to have a personality which the central character in 'PAC-MAN' does not have" and, with respect to the monsters, that "the K.C. MUNCHKIN monsters [are] much 'spookier' " (App. A6).

The Court of Appeals reached an ultimate conclusion on the issue of substantial similarity quite opposite to that of the lower court. In giving the PAC-MAN characters an unduly broad scope of protection far beyond their basic geometric forms, the Court of Appeals followed no guidelines at all in formulating a test of substantial similarity and thus granted a monopoly in the game idea of plaintiffs' audiovisual display. The Court of Appeals simply relied upon an undiscriminating ocular comparison of the two games, not the protectable work. In doing so, it failed to make an essential initial analytical comparison of the ideas as well as of the expressions in the two works and made no reference to the expert testimony in the case, although these steps were absolutely necessary to answer the threshold question of whether there had been a "copying" of any protectable audiovisual material.

REASONS FOR GRANTING THE WRIT

I.

THE CRITERION ADOPTED BY THE SEVENTH CIRCUIT FOR PROVING COPYRIGHT INFRINGEMENT IS COMPLETELY AT ODDS WITH THE CRITERIA USED BY THIS COURT AND AT LEAST THE SECOND, THIRD AND NINTH CIRCUITS

The decisions of this Court in *Baker* v. *Selden*, 101 U. S. 99 (1880) and *Mazer* v. *Stein*, 347 U. S. 201, 218 (1954) establish

beyond doubt that a copyright owner cannot, by the copyright, obtain any protection on an idea. In particular, the copyright in *Mazer* on lamp bases in the form of male and female dancers protected only the particular expressions.

In *Mazer* this Court held that the copyright owner "may not exclude others from using statues of human figures in table lamps." The Seventh Circuit failed to follow this Court's decisions when it held that distinctly different and original characters infringe a video game copyright because in both games the characters gobble dots. The Seventh Circuit has, as stated in Supreme Court Rule 17.1(c), "decided a federal question in a way in conflict with applicable decisions of this Court."

To permit the decision to stand will defeat the preservation of free access to unprotected ideas as used in commercial products, a principle long recognized by this Court. *International News Service* v. *Associated Press*, 248 U. S. 215, 250 (1918); *See also Lear, Inc.* v. *Adkins*, 395 U. S. 653, (1969); *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225 (1964); *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U. S. 234 (1964).

The defendants' fundamental defense has always been and is that nothing protectable was taken from the PAC-MAN display. In addressing this defense, the Seventh Circuit Court of Appeals failed to follow either the procedure for determining copyright infringement which is followed in the Second and Third Circuits or the procedure which is followed in the Ninth Circuit, and, as a result, its decision erroneously gives broad copyright protection to the most abstract and fundamental of geometrical forms, a circle and a bell jar.

In *Arnstein* v. *Porter*, 154 F. 2d 464 (2d Cir. 1946), Judge Frank stated for the Second Circuit that at least two elements of proof are clearly relevant to an initial determination of whether copying has occurred: the testimony of the defendant and circumstantial evidence such as the combination of access to the

copyrighted work by the defendant and similarities between the copyrighted and accused works. Further, on this initial determination of whether any copying occurred, analysis and dissection of the protected and accused work are appropriate. The testimony of experts in the field may be received to aid the trier of fact in arriving at his conclusion. Once it has been determined that copying has occurred, a second determination must be made, *i.e.*, whether the copying was illicit. In such a second step, the standard of judgment is that of substantial similarity to the ordinary lay observer, and analysis, dissection, and expert testimony are irrelevant.[3]

The Third Circuit follows the approach of the Second in *Arnstein. Franklin Mint Corp.* v. *National Wildlife Art Exchange*, 575 F. 2d 62 (3d Cir. 1978); *Universal Athletic Sales Co.* v. *Salkeld*, 511 F. 2d 904 (3d Cir. 1975).

The Ninth Circuit employs a different set of steps in applying the test of substantial similarity in order to determine whether there has been an infringement of a copyright. Yet that Circuit also makes use of a threshold step which includes analytic dissection of the copyrighted work and of the accused work and a consideration of expert testimony. *Sid & Marty Krofft Television* v. *McDonald's Corp.*, 562 F. 2d 1157 (9th Cir. 1977). Under the *Krofft* test, to find the existence of copyright violation it is necessary to find substantial similarity between both the ideas of the copyrighted and accused works as well as between the expressions of those ideas. The similarity of the *ideas* in the two works is to be determined by an "extrinsic" test which, while it may be decided as a matter of law, is one in which "analytic dissection and expert testimony are appropriate." 562 F. 2d at 1164. An "intrinsic" test is used thereafter by the court to determine whether any similarity of protectable

[3] The majority opinion of the Second Circuit Court of Appeals in *Eden Toys, Inc.* v. *Marshall Field & Company*, Slip Opinion, No. 81-7358 (March 31, 1982) (App. S) implicitly follows the analysis set forth in *Arnstein*; the dissenting opinion appears to fall into the same undiscriminating method of analysis as the Seventh Circuit did.

expression also exists, and in this step a determination of substantial similarity is the test and depends upon the response of the ordinary reasonable person.

The District Court, in the present case, followed the procedure set forth in *Arnstein*, although that authority was not specifically cited. The District Court received the testimony of the designer of the K. C. MUNCHKIN game as well as that of an expert witness, William Kunkel. Both witnesses testified that the PAC-MAN and K. C. MUNCHKIN games were different games. Based on this testimony as well as the other evidence received, including the testimony of respondents' witnesses, that court found that the K. C. MUNCHKIN audiovisual presentation had not been copied from the PAC-MAN audiovisual presentation *and* was not substantially similar to it.

The Seventh Circuit, without the benefit of a live assessment of the credibility of the witnesses, without even making reference to the testimony of those witnesses, and simply based on its own ocular comparison, found that Atari and Midway had demonstrated a likelihood of success on their infringement claim. It cited *Arnstein* and set forth the two part test of *Arnstein*, but it took no real cognizance of it or of the District Court's initial determination that there had been no copying and jumped immediately to the second stage, stating that its "analysis focuses on the second part of that test" (App. A10). The Court of Appeals, in short, proceeded to decide the case without applying either the *Arnstein* or *Krofft* initial analyses.

Moreover, the Seventh Circuit held that *all* findings necessary to support a holding of infringement of an audiovisual copyright can be determined by a judicial, "ocular" comparison of the works involved. This procedure is in direct conflict with the Second Circuit's holding in *Arnstein* that analysis and expert testimony are appropriate to determine whether copying occurred, a holding which the Third Circuit follows, and is also in direct conflict with the Ninth Circuit's holding in *Krofft* that

extrinsic analysis and expert testimony are appropriate to determine whether there is substantial similarity in the ideas expressed in the two works.

The effect of the Seventh Circuit's decision, by omitting the first analytical step and consequently misapplying the second, is to withdraw a broad segment of expression from the public domain. In the present case, the Seventh Circuit's decision extends copyright protection to preclude the expression of game characters which may be any imaginable forms or variations of a circle or of a bell jar. In fact, by the Seventh Circuit test one could not conjure up new, original characters because they would employ the old concept.

II.

THE SEVENTH CIRCUIT HAS SO MISAPPLIED THE SUBSTANTIAL SIMILARITY TEST THAT GREAT CONFUSION AND INJUSTICE WILL RESULT, ESPECIALLY AS TO VIDEO GAMES

A.

The Court of Appeals Relied Upon an Overall Ocular Impression to the Exclusion of Any of the Various Tests Suggested in the Cases

The Seventh Circuit created a new "total concept and feel" criterion to support a finding of infringement:

> "Based on an ocular comparison of the two works, we conclude that plaintiffs clearly showed likelihood of success. Although not 'virtually identical' to PAC-MAN, K. C. Munchkin captures the 'total concept and feel' and is substantially similar to PAC-MAN." (App. A20)

That cannot possibly be the test for copyright infringement of an audiovisual work resulting from the play of the two games

any more than it would have been a criterion for judging infringement of the lamp bases incorporating particular male and female dancers in *Mazer* v. *Stein*, 347 U. S. 201, 218 (1954).

The Seventh Circuit completely ignored the live testimony, including expert testimony, to separate the idea of the audio and visual presentation from its expression. The Court did attempt to exclude the maze, scoring table, tunnel exits, and use of dots in both games as being *scenes a faire*, and came to rest upon the "gobbler" and "ghost" ideas as being the nub of PAC-MAN's protectable subject matter. Then, notwithstanding the Court's review of prior authorities, it held:

> "The expression of the central figure as a 'gobbler' and the pursuit figures as 'ghost monsters' distinguishes Pac-Man from conceptually similar video games. . . . [Pac-Man] as such does not dictate the use of a 'gobbler' and 'ghost monsters.' These characters are wholly fanciful creations, without reference to the real world." (App. A16)

The Court in no way distinguished the generic nature of those characters from that of the caped super hero, the Jewish and Irish grandfathers, the bumble bee, the male and female dancers used as lamp bases, or the other characters found available to the public and unprotectable in *Warner Brothers* v. *American Broadcasting Companies*, 654 F. 2d 204 (2d Cir. 1981), *Nichols* v. *Universal Pictures Corp.*, 45 F. 2d 119 (2d Cir. 1930), *Herbert Rosenthal Jewelry Corp.* v. *Kalpakian*, 446 F. 2d 738 (9th Cir. 1971), and *Mazer* v. *Stein*, 347 U. S. 201 (1954).

The Court of Appeals, with no support in the record and despite contrary evidence, also identified the type of person who would be "an ordinary observer" of video games, but the Court's standard was expressly undiscriminating:

> "Video games, unlike an artist's painting or even other audiovisual works, appeal to an audience that is fairly undiscriminating insofar as their concern about more subtle differences in artistic expression." (App. A18)

Thus the Court embraced the unsupportable proposition that *expression* which is inseparable from *idea* to any ordinary observer is protectable.

The Court of Appeals' ultimate conclusion that the "expression of the central figure as a 'gobbler' and the pursuit figures as 'ghost monsters' distinguishes PAC-MAN from conceptually similar video games" can only be seen as an erroneous conclusion that neither a "gobbler" nor a "ghost monster" is an idea or at least an inseparable (and thus unprotectable) expression of an idea and mode of operation.

B.

Even the Attempt to Apply a Substantial Similarity Test by the Court of Appeals Was Not Grounded in Fact

A simple comparison of the plaintiffs' PAC-MAN and defendant's K. C. MUNCHKIN games shows that the Court of Appeals misapplied even the erroneous test which it found applicable. The best comparison of the games or their characters can be made from the games themselves; in the absence of those games, petitioners refer to the photographic reproductions which have been included in the appendix (App. Q).[4]

The Court of Appeals found that it was "the substantial appropriation of the PAC-MAN characters that requires rever-

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[4] The central figures of the two games are shown in the photographs at App. Q2 as they appear, from top to bottom, while stationary, while moving to the right with mouths closed, while moving to the right with mouths open, and just after having been attacked by one of the other characters. Photographs of the PAC-MAN ghosts and K. C. MUNCHKIN munchers are shown at App. Q3 as they appear, from top to bottom, while stationary, moving to the left, moving up, and while moving to the right after they have been attacked by the central figure following the role reversal.

Petitioners will arrange to have the games which were introduced as exhibits in the District Court available for the Court's inspection, if desired.

sal of the district court" (App. A16), and stated how those characters were purportedly portrayed in a manner which made the two games appear substantially similar. With respect to the central figure from which each of the respective games derives its name, the Court of Appeals referred to:

> "the relative size and shape of the 'body', the V-shaped 'mouth', its distinctive gobbling action (with appropriate sounds), and especially the way it disappears upon being captured." (App. A17)

The relative size of the central figures clearly cannot be a sound basis for finding protectable similarities. Their size is fixed by the necessity of being as large as possible for maximum visibility and yet small enough to be able to move through the maze, the maze being an aspect of the game the Court of Appeals found not to be subject to protection. At best, such a size requirement could only be expression inseparable from the idea and method of operation.

The shape of the central characters likewise can give respondents little protection. The shape of the PAC-MAN central character is a circle, perhaps the simplest form of shape for a character imaginable. When stationary, the circle has no eyes, mouth, or any other features which give it any distinguishing features. The K. C. MUNCHKIN character, in contrast, is basically in the shape of a diamond with the horizontal axis displaced below the middle of the character and the bottom truncated. Given the simplicity of the circular shape in respondents' game, the dramatic differences between the basic shapes of the two central characters could hardly be more apparent. Moreover, the K. C. MUNCHKIN character includes eyes, horns, and a smile, all of which combine to give the character a "personality" simply not found in PAC-MAN.

The V-shaped "mouth" of PAC-MAN is, again, and like the basic circle shape, so simple as to be hardly deserving of protection. It is the most elementary way in which the idea of a mouth can be conveyed. United States Trademark Registration

No. 1,016,125, dated July 15, 1975 (App. P) and United States Trademark Registration No. 799,955, dated December 7, 1965 (App. R) show exactly this type of V-shaped mouth in a circular character.

In the PAC-MAN central character, the mouth is visible only when it is open and is otherwise indistinguishable from the rest of the circular character. In the K. C. MUNCHKIN character, the mouth is used as an expressive element of the complete character. When the character is stationary, the mouth smiles, and when the central character is caught by one of the other characters, the mouth changes to a frown before the character disappears. The PAC-MAN mouth has *no* such expressive potential or use.

The Court of Appeals' description of the other game characters is equally erroneous. That court said of the three munchers in the K. C. MUNCHKIN game:

> "In size, shape, and manner of movement, they are virtually identical to their PAC-MAN counterparts." (App. A17)

As was the case with the central figures, size can hardly be a feature upon which to base a finding of similarity, since size is for all practical purposes dictated by the requirements that the characters be visible and move through the maze. To the extent that the characters in both games may have rounded tops, that is a practically universal feature of a ghost; it is inherent in the idea of a ghost. The "Peanuts" comic strip dated 1970 shows ghosts with round tops and agitated feet which are evident during almost every Halloween season (App. 03).

It is also clear that the munchers in K. C. MUNCHKIN have both squared-off tops and horns in distinction from the rounded tops of PAC-MAN. Moreover, the most distinctive feature of the PAC-MAN ghosts is the large white eyes and the pupils which are at the top, bottom, left, or right of the eyes, depending upon the direction of motion. The eyes of the characters in K. C. MUNCHKIN are vacant. They appear

simply as holes in the body and completely lack the pupils and the corresponding, direction-dependent movement of the pupils. This difference in the ghosts is perhaps most evident while the ghost or monster characters are in the process of being regenerated. As shown in the bottom picture at App. Q3, in PAC-MAN only the eyes of the ghosts are visible, and they still have their characteristic pupils. The monsters of K. C. MUNCHKIN, in distinct contrast, show dots representing the eyes as well as dots representing the feet. These artistic expressions are simply entirely different.

C.

The Standard of Substantial Similarity Has Been Clouded by the Court of Appeals: Clarification Is Critical

The Court of Appeals failed to distinguish any degree of complexity, or simplicity, of expression. It is axiomatic in copyright law that a copyright owner is not entitled to a monopoly of an idea, *Baker* v. *Selden*, 101 U. S. 99, 102-103, 25 L. Ed. 841 (1879); *Mazer* v. *Stein*, 347 U. S. 201, 217-18, 74 S. Ct. 460, 98 L. Ed. 630 (1954). Thus, the more simply a character is expressed, the more likely it is that all more detailed forms or manners of expressing that character will utilize the less complex manner of expression and be inseparble from the unprotectable idea.

In *Nichols* v. *Universal Pictures Corporation*, 45 F. 2d 119 (2d Cir. 1930), Judge Hand took great pains to describe a copyrighted play and an accused motion picture play. He defined the complexity of the protected work, saying:

> "Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the

playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended." 45 F. 2d at 122

In applying this well-known abstractions test, he held:

"It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly." 45 F. 2d at 122

The circle is the least developed character imaginable. The Seventh Circuit failed to recognize that the basic indistinct characters are a part of the unprotected ideas.

In *Warner Brothers* v. *American Broadcasting Companies*, 654 F. 2d 204, 209 (2d Cir. 1981) infringement of copyrights in the character Superman were asserted against a television series entitled "The Greatest American Hero." Holding that the television play did not infringe the copyright in suit, the Court stated:

"While the works of plaintiffs and defendants shared common ideas, themes and general imagery, we believe that the similarities are not sufficiently particular and concrete so as to represent an appropriation of the protected expression of the plaintiff's works.

* * *

"While it is true that both heroes performed feats of miraculous strength, that is too common and general a characteristic or theme to even approach the degree of concreteness and particularity deserving of copyright protection.

* * *

"As to the common use of tight-fitting acrobatic costumes, the defendants convincingly established below that such garb is common in the superhero genre rather than unique to Superman. Moreover, while Superman wears a blue leotard with red briefs, boots and cape, Ralph Hinckley's costume is a red leotard with a tunic top, no boots and a black cape."

The unprotectability of expression that is inseparable from the idea was articulated in *Herbert Rosenthal Jewelry Corp.* v. *Kalpakian*, 446 F. 2d 738 (9th Cir. 1971). There the Court held that any expression of a jeweled bee pin was inevitable from the idea of a pin itself, and of course, no copyright scope could be accorded. This principle is a primary one and is fully set forth in § 102(b), 17 U. S. C., 90 Stat. 2545 (1976):

> "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

Atari, Inc. v. *Ken Williams d/b/a On-Line Systems*, No. CV-F-81-410 MDC (E. D. Cal., Filed December 28, 1981), *appeal docketed*, No. 81-4585 (App. H), involves a suit on the same PAC-MAN copyright involved here against a manufacturer of a video game program called "Jawbreaker." The Court identified the idea of the two games as basically a maze with a small number of objects (dots or circles) aligned within the maze; an object which appears to be a mouth is guided through the maze by a player and eats the small objects. The following conclusion of law was entered (App. H5):

> "2. There is nothing protectable under the copyright laws as to the 'Pac-Man' game itself, and the laws do not protect the strategy of a player's symbol being guided through a maze appearing to gobble up dots in its path while being chased through the maze by several opponents."

In *Atari, Inc.* v. *Amusement World, Inc. et al.*, No. Y-81-803 (D. Md., filed November 27, 1981), CCH 1982 Copyright Law Decisions, ¶ 25,347, *appeal docketed*, No. 82-1099 (App. G), the idea of a game which incorporates a copyrighted audiovisual display was held freely available to others for use in their own video game:

> "All these requirements of a video game in which the player combats space rocks and space ships combine to dictate certain forms of expression which must appear in any version of such a game. In fact, these requirements

account for most of the similarities between 'Meteors' and 'Asteroids.' Similarities so accounted for do not constitute copyright infringement because they are part of plaintiff's idea and are not protected by plaintiff's copyright.

* * *

"It seems clear that defendants based their game on plaintiff's copyrighted game; *to put it bluntly, defendants took plaintiff's idea. However, the copyright laws do not prohibit this.* Copyright protection is available only for expression of ideas, not for the ideas themselves." (Emphasis added) (App. G14)

The authorities discussed above, the other Atari cases and the Court of Appeals rationale in this action, have attempted to come to grips with the application of the substantial similarity test to an audiovisual work. They have done so in different ways. The problem with respect to video games is unique. The various sub-tests employed, and the point at which they are used in each court's analysis, has clearly brought about non-uniform results, and in view of the number of pending cases this situation will be exacerbated without the aid of this Court.

This Court was faced with a similar situation in the area of patent law in *Graham* v. *John Deere Co.*, 383 U. S. 1 (1966). At that time, this Court prescribed the series of steps to be followed in applying the standard of nonobviousness which is required in order to meet the parameters of 35 U. S. C. § 103 (1952). Such action is called for now in the copyright law with respect to the test of substantial similarity of audiovisual displays, especially in video games.

III.

THE IMPORTANCE OF THE QUESTIONS PRESENTED

A.

The Economic Significance of Video Games

The size of the market which is affected by this litigation is enormous. Midway's production of the six-foot upright arcade PAC-MAN runs well over one hundred thousand machines, Chicago Tribune, March 8, 1982 (App. M2). Even the record in the present case reveals PAC-MAN sales of $150 million by Midway in one year (App. A21). Atari's sales of the home video PAC-MAN cartridges themselves are breath-catching, "over $24 million" in booked orders for game cartridges before the cartridge ever reached the market (App. A21).

The Wall Street Journal reported on March 12, 1982 that "Video game fanatics pumped nearly $1 billion in quarters into coin-operated PAC-MAN machines to play the game in the year it has been on the arcade market" (App. L1). The same article also reported:

> "'PAC-MAN will make more money for Warner than "Stars Wars," the movie, made for Twentieth Century-Fox,' says Richard Simon, a securities analyst at Goldman, Sachs & Co. ("Star Wars" grossed about $370 million, of which the movie company's share is about half). He figures that PAC-MAN will sell nine million cartridges in its first year to bring Atari about $200 million. . ." (App. L2)

Similarly, the Chicago Tribune reported on March 8, 1982

> "Before the year is over, industry analysts say it [the PAC-MAN cartridge] will be in nearly one of every ten American homes." (App. M1)

A spokesman for Atari is quoted as saying ". . . I'll go so far as to say it could account for up to 25 percent of everything done in the home game industry this year" (App. M1). It is reported

that sales of PAC-MAN cartridges are expected to be about 7.9 million units in 1982 (App. M2). It is also reported that Atari video game attachments in homes claim about 80 per cent of the video game attachment market (now estimated to be more than 8 percent of America's households), followed by Mattel's Intellevision with about 15 percent, and Magnavox's Odyssey with 3 to 4 per cent (App. M3).

The extent of literature on video games shows these games to be a dominating element of life. A non-exhaustive list of these articles appears in the footnote.[5]

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[5] *Alien Creatures in the Home*, TIME, Vol. 119, Jan. 18, 1982, at 57; J. Skow, *Games That Play People*, TIME, Vol. 119, Jan. 18, 1982, at 50; *Big-Ticket Video is the Season's Star*, BUS. WEEK, Dec. 21, 1981, at 39; L. Albin, *The Best Video Games of 1981*, TV GUIDE, Vol. 29, Dec. 12, 1981, at 4; L. Landro, Wall St. J., Jan. 27, 1982, at 29, col. 4; T. Lippman, Washington Post, Nov. 11, 1981, § 6, at 1, col. 1; D. Friendly, NEWSWEEK, Nov. 16, 1981, col. 0 at 90; D. Dorfman, Chicago Tribune, Oct. 29, 1981, § 2, at 1, col. 2; M. Barnfather, FORBES, Oct. 12, 1981, col. 1 at 34; F. Case, Seattle Times, June 17, 1981, § 5, at 1, col. 1; T. Schwartz, N.Y. Times, June 1, 1981, § 3, at 17, col. 1; M. Tackett, Chicago Tribune, April 27, 1981, § 4 at 12, col. 1; N. Y. Times, Aug. 23, 1980, at 29, col. 3; E. Williams, Financial Times, July 8, 1980, at 23, col. 1; S. Sansweet, Wall St. J., March 14, 1980, at 15, col. 1; Miami Herald, March 2, 1980, § 6 col. 2, at 1; N. Y. Times, Feb. 14, 1978, col. 2, at 55; S. Schmedel, Wall St. J., Feb. 13, 1972, col. 1, at 10; BUS. WEEK, Dec. 26, 1977, at 44; BLACK SCHOLAR, Nov. 1977, at 630; R. Walters, N. Y. Times, Sept. 18, 1977, § 7, col. 0, at 59; Wall St. J., May 25, 1977, col. 1, at 3; Wall St. J., May 5, 1977, col. 5, at 14; P. Wallich, *Other Games, Other Worlds*, SCIQUEST, Vol. 55, Feb. 1982, at 30(2); M. Kruse-Smith, *A Nation of Videots?*, PETERSON'S PHOTOGRAPHIC MAGAZINE, Vol. 10, Feb. 1982, at 24; R. Walters, *The Games Next Home*, N. Y. Times Book Rev., Vol. 87, Jan. 31, 1982, at 32; R. Walters, *The Games Came*, N. Y. Times Book Rev., Vol. 87, Jan. 31, 1982, p. 31; R. Walters, *The Book People Respond*, N. Y. Times Book Rev., Vol. 87, Jan. 31, 1982, at 31; D. Lachenbruch, *How To Find Video Bargains*, TV GUIDE, Vol. 30, Jan. 23, 1982, at 10; *Video Games As Teaching Aid*, CURRENT HEALTH, Vol. 8, Jan. 1982, at 10; *Video Games*, Variety, Vol. 305, Jan. 20, 1982,

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at 11; D. Maryles, *Ingram to Supply Video Games to Booksellers*, PUBLISHERS WEEKLY, Vol. 221, Feb. 5, 1982, at 279; J. Davis, *In Video Veritas*, PUBLISHERS WEEKLY, Vol. 221, Jan. 29, 1982, at 47; *Videogames—Fun or Serious Threat?*, U.S. NEWS AND WORLD REPORT, Vol. 92, Feb. 22, 1982, at 7; Video Games Train Army, SCIENCE DIGEST, Vol. 90, March 1982, at 24; N. Shapiro, *New Arcade Action at Home*, POPULAR MECHANICS, Vol. 155, March, 1982, at 120; L. Waller, *Game Chip Sales Have Bright Future*, ELECTRONICS, Vol. 55, Jan. 27, 1982, at 78; L. Waller, *Home Video Game Sales Are Dazzling*, ELECTRONICS, Vol. 55, Jan. 27, 1982, at 78; R. Hacker, *Video Games: Are The Space-Age Toys or Flashy Takes On An Old Shoot-'em-Up Theme?*, ROLLING STONE, Jan. 21, 1982, at 5-7; *Beating the Game Game*, TIME, Vol. 119, Jan. 19, 1982, at 54; N. Y. Times, Dec. 12, 1976, § 3, at 17, col. 3; BUSINESS WEEK, Nov. 15, 1976, at 120, col. 1; N. Y. Times, Oct. 21, 1976, at 67, col 2; Wall St. J., June 14, 1976, at 7, col. 3; Range, N. Y. Times, Sept. 15, 1974, § 6, p. 93; Wark, N. Y. Times, Dec. 12, 1976, § 3, at 17, col. 3; P. Weingarten, *Video Wars: How To Survive in Pac-Man's Dot-Eat-Dot World*, Chicago Tribune, April 4, 1982, § 12, at 1, col. 1; M. Blanchet, *Beating the Games*, Chicago Tribune, April 4, 1982, § 12, at 1, col. 4; R. Cross, *Memories and Microchips: Is This the Stuff of Nostalgia?*, Chicago Tribune, April 4, 1982, § 13, at 1, col. 1; BUSINESS WEEK, Dec. 21, 1981, at 39; MERCHANDISING, Dec., 1981, at 37; CANADIAN PLASTICS, Sept., 1981, at 49; COMPUTING, Feb. 12, 1981, at 6; ELECTRONIC NEWS, Feb. 9, 1981, at 21; APPLIANCE, Jan., 1981, at 45; J. OF ASIA ELECTRONICS UNION, March, 1980, at 44; ELECTRONIC NEWS, Aug. 11, 1980, at 4; PLAYTHINGS, July, 1980, at 10; ELECTRONIC NEWS, June 19, 1980, at 132; ADVERTISING AGE, June 12, 1980, at 10; Wall St. J., March 14, 1980, at 15; MERCHANDISING, March, 1980, at 49; MERCHANDISING, March, 1980, at 52; SALES MANAGEMENT, July 9, 1979; MERCHANDISING, Aug., 1979, at 44; N. Y. Times, June 19, 1979, at 48; ELECTRONIC NEWS, Dec. 25, 1978, at 12; ELECTRONIC NEWS, Jan. 8, 1979, at 28; APPLIANCE, Jan., 1979, at 37; HEALTHCARE, Nov. 13, 1978, at 19; BUS. WEEK, Feb. 15, 1982, at 124F; VIDEO NEWS, Jan. 22, 1982, at 6; ELECTRONIC, Jan. 27, 1982, at 78; VIDEO NEWS, Jan. 8, 1982, at 4; ADVERTISING AGE, Feb. 8, 1982, at 54; ELECTRONIC NEWS, Feb. 8, 1982, at 38; BUS. WEEK, June 22, 1982, at 102; VIDEO NEWS, Dec. 24, 1981, at 4; MART, Dec., 1981, at 33; VIDEO NEWS, Dec. 11, 1981,

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In this context, the Seventh Circuit's method of determining copyright infringement particularly as applied to video games, will have a profound effect. If it is followed in the pending actions on video games listed hereinafter, it will severely limit the distinctions which this Court and many others, including Congress, have drawn between a protectable scope of expression and the use which the members of the public may make of an idea.[6]

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at 3; Wall St. J., Feb. 19, 1982, at 39; BUS. WEEK, Nov. 19, 1979, at 52; IEEE SPECTRUM, Vol. 17Nl, Jan., 1980, at 64; *Computers Making Selves Feel At Home,* ADVERTISING AGE, Vol. 51, No. 24, June 2, 1980, at 5; *TV Games: Variety to Trigger Strong Second Half, See Stable Pricing,* MERCHANDISING, Vol. 5, No. 6, June, 1980, at 36; *6th Annual Electronics Statistical and Marketing Report,* MERCHANDISING, Vol. 5, No. 8, Aug., 1980, at 17; *Electronic Game Makers Brace for a Shake-Out—Coleco's Electronic Success,* BUS. WEEK, (Indus. Ed.) Oct. 27, 1980, at 66J; *Entertainment Holds Center Stage for Computers,* DISCOUNT MERCHANDISER, Vol. 21, No. 3, March, 1981, at 84; *Mattel: Parlaying An Adults' Toy Into a Role in Cable Television,* BUS. WEEK, June 22, 1981, at 102; *Growing Up Computing,* DATAMATION, Vol. 27, No. 6, June, 1981, at 211; *A Market Shakeout in Electronic Games: Who Will Survive?* NEW ENGLAND BUS., Vol. 3, No. 11, June 15, 1981, at 60; *Atari and the Video Game Explosion,* FORTUNE, Vol. 10, No. 2, July 27, 1981, at 40; *New Player In the Video Game,* FINANCIAL WORLD, Vol. 150, No. 15, Aug. 15, 1981, at 22; *Winning With Video Games,* INSTITUTIONAL INVESTOR, Vol. 15, No. 9, Sept., 1981, at 279; *The Riches Behind Video Games,* BUS. WEEK, Nov. 9, 1981, at 98; *Space Invaders, Videodiscs and the "Bench Connection",* TRAINING AND DEV. J., Vol. 35, No. 12, Dec. 1981, at 10; *The New Challengers in Arcade Video Games,* BUS. WEEK, Dec. 28, 1981/Jan. 4, 1982, at 62; *More Game Houses,* TELEVISION DIG., Vol. 22, Feb. 15, 1982, at 15; L. Albin, *How to Win at Video Games,* TV Guide, April 10, 1982, at 6.

[6] See the comments of Richard Stern, Washington, D.C., in *Patent, Trademark and Copyright Journal,* Bureau of National Affairs, Vol. 24, p. 14 (May 6, 1982), arguing that the video game cases might be "eroding the basis of copyright law" and citing the Seventh Circuit's opinion in the present case, which he labelled "ill-considered", as an example.

B.

Preliminary Relief in Cases Such as This One Is Often Finally Determinative

This Court should not defer its consideration of the Seventh Circuit's decision just because that decision stems from respondents' motion for a preliminary injunction. The Seventh Circuit correctly noted in its opinion that video games have a short-lived nature. The grant or denial of preliminary relief is highly likely to be the equivalent of final relief in such cases. This has been well recognized in copyright cases. *Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 274 F. 2d 487, 490-491 (2d Cir. 1960); *Thomas Wilson & Co., Inc.* v. *Irving J. Dorfman Co., Inc.*, 268 F. Supp. 711, 714 (S. D. N. Y. 1967). Respondents stated in their moving papers in the District Court that the life cycle of a home video game is typically on the average of one to two years with the peak earnings period typically lasting from three to six months after the introduction of the game to the market. Moreover, this Court has not been reluctant to grant petitions for certiorari in interlocutory matters in copyright cases involving important new areas of technology such as cable television. *Teleprompter Corp.* v. *Columbia Broadcasting System*, 415 U. S. 394 (1974); *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390 (1968).

C.

The Importance to the Judicial System, Judicial Economy, and Judicial Consistency

There have been a variety of copyright actions and various district court decisions on the test for determining copyright infringement with respect to an audiovisual display resulting from the play of video games, but the present action is the first

one from a Court of Appeals.[7] Further appeals are pending. *Atari, Inc.* v. *Amusement World et al.*, No. Y-81-803 (D. Md., filed November 27, 1981), *appeal docketed*, No. 82-1099 (App. G), and *Atari, Inc.* v. *Ken Williams, d/b/a On Line Systems*, No. CV-F-81-410 MDC (E. D. Cal., filed December 29, 1981), *appeal docketed*, No. 81-4685 (App. H), include questions of the breadth to be accorded a copyright in the audiovisual display of a video game. There appear to be more than 40 additional actions in the District Courts.[8] The International Trade Commission has also had to deal with this issue in *In the*

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[7] *Stern Electronics, Inc.* v. *Kaufman*, 669 F.2d 852 (2d Cir. 1982) dealt with the question of whether an audiovisual display of a video game was subject to copyright protection; that decision did not deal with the question of infringement.

[8] *Atari, Inc.* v. *Armenia Co., et al.*, No. 81 C 6099 (N.D.Ill. 1981); *Cinematronics, Inc.* v. *Shapiro*, No. CIV 81-328 PHX VAC (D.Ariz. 1981.); *Cinematronics, Inc.* v. *Noma Enterprise Co. et al.*, No. CIV 81-439-PHX-CAM (D. Ariz. 1981); *Cinematronics, Inc.* v. *Compu-Game, Inc.*, No. 81-0922-K (S. D. Cal. 1981); *Midway Mfg. Co.* v. *Universal Co. et al.*, No. 80-02414 (C. D. Cal. 1980); *Midway Mfg. Co.* v. *Artic International, Inc.*, No. 80-5863 (N. D. Ill. 1980); *Midway Mfg. Co.* v. *Drikschneider et al.*, No. CV 81-0-243 (D. Neb. 1981); *Midway Mfg. Co.* v. *Omni Video Games, Inc., et al.*, No. 81-1461 (D. Mass. 1981); *Midway Mfg. Co.* v. *Krukenberg et al.*, No. 81-320-ORL-CIV-Y (D. Fla. 1981); *Midway Mfg. Co.* v. *Krukenberg et al.*, No. 81-321-ORL-CIV-Y, (D. Fla. 1981); *Midway Mfg. Co.* v. *Venture Line, Inc. et al.*, No. CIV 81-865 PHX CAM (D. Ariz. 1981); *Midway Mfg. Co.* v. *KK Industrial Service Co. et al.*, No. CV 81-676 (D. Ariz. 1981); *Midway Mfg. Co.* v. *Taito Hawaii Corp. et al.*, No. 81-0285 (D. Hawaii 1981); *Midway Mfg. Co.* v. *Sutra Import Corp. et al.*, No. CIV-81-438-PHX-CHL (D. Ariz. 1981); *Midway Mfg. Co.* v. *Coleco Indus., Inc.*, No. 81-5947 (C. D. Calif. 1981); *Nintendo of America, Inc.* v. *Ruthruff, et al.*, No. C81-1278M (W. D. Wash. 1981); *Nintendo of America, Inc.* v. *Perry*, No. 82-38-ORL-CIV-R (M. D. Fla. 1982); *Stern Electronics, Inc.* v. *James et al.*, 81 CIV 5761 PWS (S. D. N. Y. 1981); *Stern Electronics, Inc.* v. *Gameways, Inc.*, No. 81 CIV 5766 RWS (S. D. N. Y. 1981); *Williams Electronics, Inc.* v. *Godsey*, No. CV81-G-0850-NW (N. D. Al. 1981); *Williams Electronics, Inc.* v. *Northwest Billiard Supply, Inc. et al.*, No. A1-81-151 (D. N. D. 1981); *Williams Electronics, Inc.* v. *Egawa Int'l Co.*,

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Matter of Certain Coin-Operated Audiovisual Games and Components Thereof (viz., Rally-X and Pac Man), Investigation No. 337-TA-105, Temporary Relief Phase, (January 15, 1982), CCH 1982 Copyright Law Decisions, ¶25,367 ("Games II"), but no analysis of copyright scope was made (App. K). That proceeding involves 55 named respondents, several of which are named parties in the District Court actions. The Commission has, however, applied a test of copyright infringement in *In the Matter of Certain Coin Operated Audio-Visual Games and Components Thereof*, Investigation No. 337-TA-87 (June 25, 1981), CCH 1981 Copyright Law Decisions, ¶25,299 ("Games I"), a proceeding which involved 21 named respondents (App. J).

D.

The Copyright Act of 1976 Governs the Questions Presented

Section 102(a) of Title 17 U. S. Code which became law on January 1, 1978, identified a category of copyrightable work

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No. 81-6097 (S. D. N. Y. 1981); *Williams Electronics, Inc.* v. *Artic International, Inc. et al.*, No. 82-1852 (D. N. J. 1982); *Williams Electronics, Inc.* v. *Kutkowski*, No. CV 81-4046 (E. D. N. Y. 1981); *Williams Electronics, Inc.* v. *McCarthy et al.*, No. 82 C 0639 (N. D. Ill. 1982); *Midway Mfg. Co.* v. *Strohon et al.*, No. 82 C 1305 (N. D. Ill. 1982); *Rosenthal* v. *Sega Enterprises, Inc. et al.*, No. 79 0281 RJK (GK) (C. D. Cal. 1979); *Stern* v. *Amusement Consultants*, No. 81 2581 (E. D. N. Y. 1981); *Williams Electronics* v. *U.S. Amusement Corp.*, No. 81 3574 (D. N. J. 1981); *Cinematronics* v. *Nomo Enterprises*, No. 81 4644 (C. D. Cal. 1981); *Midway Mfg. Co.* v. *U.S. Amusement*, No. 81 3696 (D. N. J. 1981); *Midway Mfg. Co.* v. *Bandai-America*, No. 81 3911 (D. N. J. 1981); *Brown* v. *Tabb*, No. 80 5235 (N. D. Ala. 1980); *Midway* v. *Bandai America, Inc.*, No. 81-5947 (C. D. Cal. 1981); *Coyle* v. *Midway Manufacturing*, No. 81-3099 (C. D. Cal. 1981); *Universal Co. Ltd.* v. *Ball*, No. 80-2414 (C. D. Cal. 1980); *Entex* v. *Warner Communications*, No. 80-748 (C. D. Cal. 1980); *Bally* v. *Victor Kastil*, No. 80-1887 (D. N. J. 1980); *Bally* v. *Casino Control Commission of N.J.*, No. 81-450 (D. N. J. 1981); *Atari* v. *IEC Electronics Corp.*, No. 79-444 (W. D. N. Y. 1979); *Bally 80* v. *Williams Electronics*, No. MS-1-80-023 (S. D. Ohio 1980).

Source: Administrative Office, U. S. Courts; reports filed with the Copyright Office pursuant to 17 U. S. C. § 508, and telephone calls to Clerk's Office of various district courts.

as "(6) motion pictures and other audiovisual works", and 17 U. S. C. § 101 defines an "audiovisual work" (App. F).

Section 102(b) is also a new statutory provision in the Act of 1976 (App. F) but it codifies the previously articulated limitations of copyright protection to only the separable expression of an idea. The Notes of the Committee on the Judiciary, House Report No. 94-1476, 94th Cong., 2d Sess. 57, *reprinted in* [1976] U. S. CODE CONG. & AD. NEWS 5659, 5670, state that Section 102(b) makes clear the strict limitation of copyright protection and exclusions therefrom. The report further states "Its purpose is to restate, in the context of the new simple Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged."

This Court has not had prior occasion to address those sections of the new Copyright Act. This case cries out for a delineation of the appropriate guidelines and tests for deciding infringement under 17 U. S. C. §102(b). It is of such importance both economically and in terms of pending litigation that this Court should provide the needed guidance under the new Act.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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